No. 02-1802

(3)

SUPREME COURT, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH BENNARD NICHOLS

Petitioner,

v.

STATE OF TEXAS

Respondent.

On Petition For A Writ Of Certiorari
To The Texas Court Of Criminal Appeals

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Texas Court of Criminal Appeals committed legal error when it rejected Nichols' *Brady* claim – (a) the State suppressed the location, identity and testimony of one out of two eyewitnesses to the murder, and (b) the State suppressed inconsistencies in the other eyewitness' testimony – on the grounds that the evidence was immaterial.

2. Whether the Texas Court of Criminal Appeals incorrectly applied this Court's well-established federal law regarding the State's presentation of false and misleading evidence by not conducting a harmless-error analysis.

3. Whether it was error for the Texas Court of Criminal Appeals to adopt the district court's conclusion that the undisclosed information could have been obtained by defense counsel's diligence, notwithstanding the fact that there was no reasonable basis for concluding that counsel for Nichols could have discovered the identity, location and testimony of the missing eyewitness prior to or during the trial.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In Respondent's Brief in Opposition to Nichols' Petition for Writ of Certiorari (the "State's Brief"), the State sets forth two new issues: (1) the "Question [sic] presented for Review Are Unworthy of the Court's Attention"; and (2) "Nichols' Allegation of Perjured Testimony Is Not Properly Before the Court." *See State's Brief* at pp. 10-13. Both issues are without merit and should be disregarded by this Court. Additionally, in the State's reply to Nichols' *Brady* claim, the State relies on erroneous law and facts in an attempt to dissuade this Court from exercising its certiorari jurisdiction.

This Court should not be swayed by the State's smoke and mirrors attempt to draw attention away from the numerous wrongs committed during Nichols' trials. The Court should grant review to address the important issues of federal law improperly applied by the Texas Court of Criminal Appeals.

I. The Questions Presented For Review Are Worthy Of This Court's Attention.

The State contends that the issues presented in this case involve only the application of established constitutional principles to the facts; thus, "the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction." *See State's Brief* at p. 10.[1] Such an assertion is unfounded and the questions presented are worthy of this Court's review.

This Court's certiorari jurisdiction is necessary when a state court decision is "contrary to ... clearly established Federal law, as determined by [this Court] ... if the state court arrives at a

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[1] Nichols did file his federal habeas petition in the Southern District Court of Texas for fear of running a foul of the AEDPA statute of limitations deadline. *See State's Brief* at p.11.

conclusion opposite to that reached by the Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). In the case at bar, the Texas Court of Criminal Appeals decision unreasonably applied clearly established federal law by allowing the following acts to go uncorrected: (1) the State's suppression of exculpatory and impeachment evidence that was material to Nichols' trials; (2) the State's presentment of knowingly false testimony and evidence to the trial court and the trier of fact; and (3) the Texas Court of Criminal Appeals conclusion that Nichols failed to show that the undisclosed information could not have been obtained by defense counsel's due diligence.

This Court's certiorari jurisdiction is triggered when determinations, such as those made in the case at bar, are clearly against established federal law. *Texas v. Cobb*, 532 U.S. 162 (2001) (granted certiorari and reversed the Texas Court of Criminal Appeals Sixth Amendment determination as against federal law). The State's assertion that this Court "rarely grants review at this stage of the proceedings" is unfounded. This Court is apt to grant review when wrongs continually plaque the state criminal justice system, as is happening in Texas. As a matter of fact, this Court will often grant review when the questions presented show a clearly erroneous application of well-established federal law. *Texas v. Cobb*, 532 U.S. 162 (2001) (certiorari granted on direct appeal from the Texas Court of Criminal Appeals); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (certiorari granted on direct appeal from the Superior Court of Pennsylvania).

The issues presented in this case involve the misapplication of clearly established federal law; thus, the petition presents an important question of law that justifies this Court's exercise of its certiorari jurisdiction.

II. Nichols' Allegations Of Perjured Testimony Are Properly Before This Court.

In the State's Brief, the State claims, among other things, that this Court should not review Nichols' question concerning the presentation of false and misleading evidence because this issue: (1) was not raised in the state court below; and (2) assuming *arguendo* that the claim was raised in the courts below, such claim is barred as a successive petition. *See State's Brief* at 11-13. Such assertions are neither grounded in fact or law and whether the State knowingly presented false testimony is correctly before this Court.

A. Nichols' false testimony claim was raised in the state habeas court.

The state habeas court agreed with Nichols' assertion that false testimony was presented during Nichols' second trial. *See* NMF 9 (finding "the State's presentation of evidence was known to be false"); NFF 32 (finding "when the State proffered its subpoena list, it listed the eyewitness as "McGee" when it admittedly knew that her name was Ishman); NFF 35 (finding "the State continued to allege that it could not locate "McGee," after the State knowingly extradited her to Louisiana). The state habeas court found that during Nichols' trial, the State made false statements to the jury by claiming that Johnson "ran to the back and stood back there with another woman that was back there, Teresa McGee." NFF 42(d)(ii).

Interestingly, instead of drafting one complete set of findings and conclusions, the state habeas court merely circled "GRANTED" or "DENIED" on the conclusions of law and findings of fact presented by Nichols and the State. As a result, Nichols did present its claim of false testimony which the state habeas court entered a ruling on by circling "GRANTED".

Additionally, Nichols presented its claim of false testimony to the Texas Court of Criminal Appeals. In Nichols' Objections to

the District Court's Conclusions of Law and Request for Habeas Relief filed with the Texas Court of Criminal Appeals, Nichols specifically requested a review of all of the state habeas court's fact-findings since they compelled a finding of a constitutional violation. The Texas Court of Criminal Appeals complied with Nichols request by addressing the fact-findings made by the state habeas court and concluding that from a review of "the record from [the] hearing" and "the trial court's findings . . . the relief sought should be denied." *See Nichols' Petition for Writ of Certiorari at Appendix A.* As evidenced by the Texas Court of Criminal Appeals decision, Nichols did present his claim of false testimony, which the court reviewed and denied.

If federal claims have been fairly presented to the state court, the petitioner has exhausted state remedies even if the highest state court does not actually rule on the merits of the claims. *See Picard v. Connor*, 404 U.S. 270, 276-77 (1971). The absence in the relevant opinion of the highest state court to any reference of the federal claim presented does not mean that the claim was not fairly presented in the state court. *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (federal claim raised in petitioner's state court briefs, though not addressed by the state high court, was exhausted for state habeas proceedings). Simply because the Texas Court of Criminal Appeals failed to clearly address the issue of false testimony does not mean it was not raised in the state courts below.

It is clear that Nichols presented to the state habeas court evidence as well as findings of fact and conclusions of law relating to the State's presentation of false testimony, to which the state habeas court responded. Additionally, Nichols presented the entirety of the State's findings of fact and conclusions of law to the Texas Court of Criminal Appeals for review, to which the court responded. Both the state habeas court and the Texas Court of Criminal Appeals have responded to Nichols false evidence claim;

therefore, such conclusion has been exhausted and is ripe for this Court's review.

B. Nichols' false testimony claim is not a successive petition.

Within the State's Brief, the State concludes that the false testimony claim presented by Nichols is an "abuse of the writ" under Section 5(a) of Article 11.071 of the Texas Code of Criminal Procedure and should be dismissed. *See State's Brief* at p.13. However, this claim was not "previously available" as recognized by the Texas Court of Criminal Appeals April 30, 1997, order. The April 30, 1997 order reversed a decision made by the state habeas court finding "the instant application is a subsequent application." *See Appendix B.* Specifically, the Texas Court of Criminal Appeals determined that evidence relating to the suppression of Ishman "was unavailable" and could not be a subsequent application. *Id.*

The false testimony presented could not have been known since the false testimony presented referred to Ishman. Nichols asserts that the false testimony presented by the State was in connection with the presentation of the State's subpoena list knowing the information contained therein was false (the name and location of Ishman) and the presentation of testimony referring to "McGee" when the State knew her name was Ishman. Nichols could not have presented a false testimony claim in the first habeas proceeding since the information about Ishman was unavailable as acknowledged by the Texas Court of Criminal Appeals. *Id.* As such, the State's argument that Nichols' false testimony claim is successive is erroneous.

III. The State Did Suppress Exculpatory Evidence.

Nichols' federal habeas complaint centers on the suppression of Ishman, including the suppression of her identity, location, and prior testimony. The State's Brief erroneously

focuses on the Fifth Circuit determination during Nichols' first federal habeas proceeding to assert that Ishman was not material and that Johnson's and Ishman's affidavits were not material. *See State's Brief* at pp. 15, 16, and 17. The State's reliance is misplaced since this issue was not before the Fifth Circuit in the referenced proceeding.

> This [Ishman] issue is not properly before us. The [Ishman and Johnson] affidavits are not a part of the record (and no complaint has been made of the ruling denying the motion to expand the record); and they were tendered to the district court in respect to a *Brady* claim [that was preserved for later review]. . . . There was no allegation concerning Johnson or Ishman or the subject matter to which their affidavits are now alleged to be relevant. These allegations in the petition are plainly inadequate to raise a constitutional issue in the respect now asserted on appeal.

Nichols v. Scott, 69 F.3d 1255, 1286 (5th Cir. 1995).

The importance of Ishman's testimony is the "potential [it carries] ... for the destruction of [the observing witness'] identification of [defendant]." *See Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985); *see also*, *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (citing *United States v. Agurs*, 427 U.S. 97, 112-13 n.21 (1976) (finding favorability when one, out of only two, eye-witness impeaches the testimony of the other eye-witness to the crime and that eye-witness is suppressed)). Assuming *arguendo*, that Ishman did not "witness" the murder, she impeaches the State's star witness who was brought forward as an actual eye-witness to the murder. Ishman's testimony, among other things, discredits the State's case by showing that the "star eye-witness" was not a credible eye-witness at all. The importance of this testimony simply "cannot be doubted." *Id.*

IV. Conclusion.

The State's Brief asserts no reason why this Court should not grant review. This case presents important decisions regarding Texas' improper application of federal law. Nichols has been confined to death row for twenty-one years due to the State's suppression of impeachment and exculpatory evidence that was material to Nichols' trials and the State's presentation of knowingly false testimony and information. The numerous erroneous determinations of federal law made by the state habeas court and affirmed by the Texas Court of Criminal Appeals warrant this Court's review.

Joseph Bennard Nichols requests this Court grant review to right a terrible wrong committed by the State nearly a quarter of a century ago.

Respectfully Submitted,

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